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IN THE SUPREME COURT OF THE UNITED STATES.

PABST BREWING COMPANY,
Appellant,

vs.

G. Y. CRENSHAW AND
JOHN J. DOWNEY,
Defendants.

85.

BRIEF AND ARGUMENT FOR APPELLANT.

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STATEMENT OF THE CASE.

This is an appeal from a decree of the Circuit Court of the United States for the Western District of Missouri dismissing complainant's bill. The bill was filed by the Pabst Brewing Company, a corporation of the State of Wisconsin, to enjoin the defendant, G. Y. Crenshaw, as state beer inspector, and his assistant, from enforcing against the complainant the provisions of a certain act of the legislature of Missouri entitled "An act creating the office of inspector of beer and malt liquors of the State, and providing for the inspection of beer and malt liquors manufactured and sold in this State," approved March 4, 1899. (Session laws of Missouri, 1899, p. 228.)

The act, in its entirety, is set forth as an appendix to this brief. It creates the office of beer inspector, to be appointed by the governor of the State, and defines his duties.

Section 3 of the act provides that every person or corporation keeping a brewery for the manufacture of beer or malt products within the State shall cause the same to be inspected by the beer inspector.

Section 4 requires that such malt liquor shall contain no other substances than pure hops or pure extract of hops or pure barley, malt or wholesome yeast or rice.

Section 5, which has special reference to the beer or malt liquors manufactured without the State, provides, in substance, that every person or corporation who shall receive for sale or offer for sale any beer or other malt liquors other than those manufactured in the State shall, upon receipt of the same and before offering for sale, notify the inspector, who shall be furnished with a sworn affidavit subscribed by an officer authorized to administer oaths, from the manufacturer thereof, or other reputable person, having actual knowledge of the composition of said beer, or other malt liquors, that no material other than pure hops, or the extract of hops, or pure barley, malt or wholesome yeast, or rice, was used in the manufacture of the same, and then provides: "Upon receipt of said affidavit, the inspector shall inspect and label the packages containing said beer or malt liquors, for which services he shall receive like fees as those imposed upon the manufacturers of beer and malt liquors in this State."

Section 6 provides for the keeping of books of record of fees collected and expenditures incurred, to be reported to the governor of the State.

Section 7 makes it the duty of the inspector to cause to be inspected all beer or other malt liquors brewed, manufactured or sold in the State, and if found to come up to the requirements of the statute, he shall place upon the package containing such beer or malt liquor his label certifying that the same has been inspected and is made of wholesome ingredients.

Section 8 fixes the inspection fees at one cent for each gallon contained in each package and two cents for labeling each package, which fees are to be paid into the state treasury. The word "package" as used in the act shall mean any kind of vessel, other than pint and quart bottles, in which any beer or malt liquor may be placed for sale, containing eight gallons or less. When said beer, etc., is placed in pint or quart bottles, a "package" shall be construed not to exceed forty-eight pint bottles or twenty-four quart bottles, which, when manufactured and so bottled, must, before sale, be placed in suitable cases containing said number and size of bottles, for inspection and stamping by said state inspector; and when placed in vessels containing more than eight gallons the word "package" shall mean each eight gallons, or fractional part thereof, so contained in said vessel.

Section 9 provides that the expense of said office, including the salaries of the inspector and his deputies, shall be paid monthly out of the amount appropriated by law from the general revenue fund; and all fees received by the inspector under the provisions of the act shall, on or before the last day of each month, be paid into the state treasury, and placed to the credit of the general revenue fund.

Section 10 declares that any person who shall sell any beer or malt liquors in the State which have not been inspected according to the provisions of the act, or contained in packages which shall not have upon them the certificate of the State inspector, etc., shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding five hundred dollars, or by imprisonment in the county jail for a period not less than six months, and in addition thereto shall have his license or other authority giving him the right to manufacture or sell said liquors in the State, revoked, and shall not again receive any such license or authority for a period of two years.

Section 12 provides that all prosecutions for violations and penalties under the provisions of the act shall be either by indictment or information in any court of competent jurisdiction.

Section 13 declares that all beer or other malt liquors manufactured in the State and exported outside of the State for sale, shall be inspected as other liquors designated in the act, but said inspection shall be free of cost to the manufacturer.

It was charged in the bill of complaint that the complainant is a manufacturer, in the State of Wisconsin, of grades of beer and malt liquor requiring special treatment. That it annually ships into Missouri not less than 15,000 barrels of beer, and other malt liquors, of 31 gallons each, of the aggregate value of not less than $100,000. That it has a warehouse in Missouri in which its beer is stored, and that about one-half shipped into the State is subsequently reshipped from its warehouse and sold in other States. The bill states that a large number of persons are engaged in the manufacture of beer in Missouri, a large quantity of which is for sale in the State, and also for export therefrom, and that a very large quantity is also shipped into the State from other States and countries. It is further charged in the bill that while the act is passed ostensibly as an inspection measure, the fees taxed bear no just relation to the expense of such inspection. That the entire expense of the inspection, as provided by the act itself, amounts to $12,000 per year, while the inspection fees for the beer annually sold in the State, as set forth in the bill, amount to not less than $555,000, an excess of more than $500,000 above the cost of the inspection, which excess of over $500,000 is, by the terms of the act, and by its necessary operation and effect, a specific tax upon beer sold in the State of Missouri levied for the purpose and required by the act to be turned into the general revenues of the State for the use of such general revenue, and that

to such tax the complainant, as an interstate shipper, contributes a large sum. And it is charged in the bill that the said act is a burden upon interstate commerce beyond the police power of the State to impose, and that it is, therefore, violative of the commerce clause of the federal constitution.

A number of other federal claims of immunity from the operation of the statute were invoked by the bill, which were briefly epitomized by the learned District Judge who disposed of the case, as follows:

"1st. That the act imposes upon the product of the importer into the State a greater exaction than upon the product of the manufacturer in the State, or is imposed upon the property of other persons in the State, and is, therefore, an unjust discrimination against the non-resident brewer; and is, therefore, in conflict with the fourteenth amendment and the interstate commerce clause of the Federal Constitution.

"2nd. That not less than 7,500 barrels of 31 gallons each, of the value of $50,000, shipped into the State by the complainant, is intended for subsequent exportation to other States; and is sold and reshipped to other States in the original packages, although brought into the State and stored in complainant's warehouse; and that complainant is compelled to pay, and does pay, to the State inspection fees upon that part of its product intended for other States, in violation of section 8 of article 1 of the Constitution of the United States.

"3rd. That such inspection fees are not required to be paid on the beer manufactured in the State of Missouri and exported therefrom, while such fees are required on the beer manufactured outside of the State by complainant and shipped through Missouri into other States.

"4th. That while $12,000 is appropriated for the cost of inspection, and that as no part of this sum is paid by the manufacturer of beer in the State of Missouri upon their products exported for sale, an unjust proportion of these salaries is collected from the complainant.

"5th. That the act requiring the non-resident brewers to furnish an affidavit of the ingredients from which his

beer is manufactured costs the complainant one thousand dollars annually, while the domestic manufacturers are not required to furnish such affidavits; and that when such affidavit is submitted, it is of no force or effect and does not take the place of an inspection. But that the act, nevertheless, requires in addition to such affidavit an inspection which necessitates the breaking open of the packages in which the beer is contained, and that this will result in the destruction of at least one package of each shipment, as the beer in the bottle opened will become 'stale, flat and unprofitable.'"

The foregoing extracts from the bill, as epitomized, pertain to subjects not now here for discussion, but are stated as part of the history of the case.

The Supreme Court of Missouri by a divided Court, four to three, has affirmed the validity of the statute.

State vs. Bixman, 162 Mo. 1.

It was held by the Supreme Court of Missouri that the act did not apply to beer shipped into the State destined for export beyond its borders. In its application to beer manufactured within the State, the Supreme Court held that the construction placed by the brewers upon the statute, requiring a physical inspection and analysis of the contents of the package after it was put up by the brewer for sale, was untenable, holding that it was contemplated that the inspection should be made of the mash or fermented beer at the brewery before it passed into the package or receptacle for sale. The Court did not have before it for consideration the case of non-resident brewers, in which this method of inspection, suggested as the course to be pursued under the statute, would be manifestly impracticable. Commenting upon these facts of the case and the interpretation by the Supreme Court adverted to, the lower court said, in the course of its opinion (p. 43):

"Reading the phrase in Section 5, 'upon receipt of said affidavit, the inspector shall inspect and label the packages containing said beer or malt liquor,' in connection with Sections 7 and 8, which impose upon the inspector the duty of causing to be inspected all beer or other malt liquors brewed, or manufactured, or sold in this State, to determine its ingredients, gives color to the contention that a physical inspection of the imported beer for sale in the State, in the mind of the legislature, is as much required as in the case of the domestic manufacturer. It must be conceded that the Supreme Court of the State, in passing upon said Section 7, in respect of the domestic manufacturer, was placed in distress in upholding the validity of the statute, to avoid a construction that seemingly required a physical opening of the package after it was put up by the brewer for sale, by holding that it was contemplated that the inspection should be made of mash or fermented beer at the brewery before it passed into the packages or receptacles for sale. The Court felt compelled to resort to this judicial *coup de tat* to avoid the criticism that such mode of inspection involved a physical destruction of a part of the property of the owner, without making any provision for just compensation therefor, and thus taking private property without due process of law; and further to escape following the recognized rule that in determining the validity of a legislative act, the question is, what do its terms authorize to be done under them, rather than, what is done under them. But, as already shown, the mode of inspection suggested by the State Supreme Court respecting the inspection of domestic beer, would be quite impracticable in the case of beer manufactured outside of the State."

And thereupon the learned Federal Judge held that in order to sustain the act, as applied to interstate shipments of beer, *there could be no physical examination or inspection of the beer at all*, but the entire requirement of the act must be confined to the production of the affidavit and affixing the stamp or label on the package mentioned in Section 5.

The case was practically decided upon a demurrer to the bill. It was the opinion of the Court that it was bound

to accept and follow the decision of the State Supreme Court and treat this as an inspection act, and therefore a proper exercise of the police power of the State; that so regarding the act it came within the terms of the Wilson bill and was not an unlawful burden upon interstate commerce. The demurrer, however, was overruled upon a technical point of pleading not now necessary to consider. Afterwards an agreed statement of facts was signed by the parties and submitted to the Court which sustained the allegations of the bill and upon which, following the reasoning announced in its opinion upon the demurrer, and upon the grounds just indicated, the Court entered a decree dismissing the bill. It is to review this decree that this appeal is prosecuted.

In view of the ruling of the Supreme Court that the inspection fees cannot be exacted on beer destined for reshipment beyond the State, the particular ground of grievance in complainant's bill based on alleged discrimination in favor of the domestic manufacturer and importer, is eliminated from the case. Furthermore, under the construction of the Federal Circuit Court that the only method of inspection, so-called, permissible under the statute, is the requirement of an affidavit, and it appearing from the agreed statement that such is in fact the practice of the state officers charged with administering the law, the further ground of complaint of the destruction of the property of the brewer without compensation therefor, is also taken out of the case.

This, therefore, leaves as the sole remaining question for determination in this Court whether the act as thus construed and administered is a proper exercise of the police power of the State and is not a burden upon interstate commerce in contravention of Section 8 of Article 1 of the Constitution of the United States as applied to the complainant, an interstate shipper and dealer.

The facts charged in the bill of the extent of revenue derived from the act and the cost of its administration are

substantially admitted. The Supreme Court of Missouri held notwithstanding such facts "that the act was not a revenue measure as distinguished from a mere inspection bill under the police power of the State." The learned District Judge, erroneously, as we conceive, construed this declaration of the Supreme Court as binding upon the Federal Court and therefore held accordingly and dismissed the bill.

SPECIFICATIONS OF ERROR.

I.

The Court erred in holding that the act in question, as construed and administered by the State Court and officers, was not, as against the complainant, a burden upon interstate commerce in violation of Section 8 of Article 1 of the Constitution of the United States.

II.

The Court erred in deeming itself bound by the characterization placed upon the statute by the Supreme Court of the State as an inspection measure within the police power of the State to enact.

III.

The Court erred in holding that the Act of Congress of August 8, 1890, authorizes a statute like the one in question.

IV.

For the foregoing reasons the Court erred in dismissing complainant's bill.

ARGUMENT.

The argument which we have to make in this case is centered in the foregoing constitutional provision. It, perhaps, will tend to clearness and precision of thought if we divide our topic into a number of subdivisions into which

it naturally falls under the facts in the case. Whilst the interstate character of complainant's business and its consequent right to raise the federal question was not doubted by the Court below, nor disputed by counsel for the State, it is, perhaps, none the less proper to premise by briefly adverting to the nature of the business as conducted by complainant, for the purpose of demonstrating that it is of a character which can invoke the immunity claimed.

I.

THE BUSINESS OF THE COMPLAINANT IN MISSOURI IS THAT OF INTERSTATE COMMERCE.

Paragraph 20 of the agreed statement of facts, appearing on page 66 of the record, sufficiently describes the nature of complainant's business and the manner in which it is conducted. It is as follows:

"20th. That complainant has no brewery plant or manufactory for the brewing or manufacture of beer or other malt liquors in the State of Missouri; that its business as conducted and maintained in the State of Missouri consists solely in its maintaining a depot in which it stores the product of its brewery, and in due course of its business it removes said beer from its depots and delivers it in the original packages to its consumers; that none of the products sold by complainant is manufactured or brewed in the State of Missouri, but is manufactured in the State of Wisconsin, and is there put into kegs, barrels and bottles. When thus put up it is shipped to and stored in complainant's depot at Kansas City, and is thereafter removed from such depot and delivered to the complainant's customers in the original package; that its depot in Kansas City is necessary for the proper conduct of its business, and is only used as a place for storage and for no other purpose, and that it has conducted its business in this manner for many years and desires and intends so to do in the future."

Schollenberger vs. Pennsylvania, 171 U. S. 1, presents a case very similar in its features, in this respect: There it appeared that oleomargarine was consigned by the Oakdale

Manufacturing Company of Rhode Island to its agents, as wholesale dealers in oleomargarine in Philadelphia, and was there sold by them in the original packages to retailers in the city. The only distinction between the cases is that here the complainant uses its own warehouse or depot in Kansas City to facilitate its business, the distribution thence being made by its own employes, whereas, in the Schollenberger case the Oakdale Manufacturing Company utilized the warehouse and depot of another. Both cases present the right of the commodity to retain its character of interstate commerce until final sale and distribution among the trade. This claim was sustained by this Court. After reviewing the authorities and demonstrating that the commerce clause extends to every species of commercial intercourse and does not stop at the external boundary of the State, but that sale is the object of and indispensable to importation into the State, the Court concludes, on page 24:

"The importer had the right to sell not only personally, but he had the right to employ an agent to sell for him. Otherwise his right to sell would be substantially valueless, for it cannot be supposed that he would be personally engaged in the sale of every original package sent to the different States in the Union. Having the right to sell through his agent, a sale thus effected is valid.

"The right of the importer to sell cannot depend upon whether the original package is suitable for retail trade or not. His right to sell is the same, whether to consumers or to wholesale dealers in the article, provided he sells them in original packages."

So in the case of United States vs. Swift & Co., 122 Federal, 529, which was an indictment of the defendants for violation of the Sherman anti-trust act, it was contended by the defendants that their business was not interstate commerce. The following paragraph of the opinion, on page 533, sufficiently presents the point and the way in which Circuit Judge, Grosscup, disposed of it :

"I think the same is true of meat sent to agents, and sold from their stores. The transaction in such case, in reality, is between the purchaser and the agents' principal. The agents represent the principal at the place where the exchange takes place; but the transaction, as a commercial entity, includes the principal, and includes him as dealing from his place of business. Indeed such privity exists between the principal and the transaction that he could, at the instant, as a citizen of another State, sue upon the transactions in the Federal Courts; nor have I any question that if the conditions of this case were reversed, so that the defendants were invoking the shelter, instead of seeking to escape the obligations, of the commerce clause, federal law, would be found equal to the protection asked."

Neither is there anything in the cases of New York vs. Roberts, 171 U. S. 658, 662; Reymann Brewing Co. vs. Brister, 179 U. S. 445, and cognate decisions of this Court, which militate against the interstate quality of complainant's business. Those were cases which involved the right of the State to levy a tax, a distinction long recognized and well settled and clearly pointed out by Judge Grosscup in his opinion in United States vs. Swift & Co., supra, (p. 533) as follows:

"It is enough to say that because a thing can be taxed by the State, it does not follow that it lies outside the body of interstate commerce; for commerce, interstate as well as domestic, is subject to the police and taxing power of the State, so long as the exercise of such power does not interfere with the national government's exclusive right of regulation."

See also Robbins vs. Shelby Taxing District, 120 U. S., 489;
Stockard vs. Morgan, 185 U. S., 27-30.

We will hereafter discuss the Act of Congress known as the Wilson bill in its relation to the power of the State and in respect to any distinction which it makes between liquors and other commercial commodities. Suffice to say

here that the Wilson bill does not furnish a rule for determining the interstate aspect of a business, but merely permits the exercise of the police power of the State at an earlier period of time upon intoxicating liquors. The complainant's business, therefore, being interstate commerce, as defined in the decisions of this Court, we come to the pivotal question in this case:

II.

IS THE STATUTE WITHIN THE POLICE POWER OF THE STATE?

There are two prominent objections which we urge to this legislation:

First, the fees charged for inspection bear no just relation to the expense, but are so grossly in excess thereof and out of proportion thereto as to make the act an unreasonable burden upon commerce; and, second, the inspection, so-called, authorized by the statute, as construed by the lower court and as practiced by the State officers, is not an inspection in fact, but is a palpable pretense, which is not calculated to and which cannot secure pure and wholesome beer, or accomplish any other public good in relation to the commodities affected by the act.

Section 8 of the act provides for an inspection fee of one cent per gallon on all beer and malt liquors manufactured and sold in the State, and two cents for labeling each package of eight gallons or less, making a total fee of one and one-fourth cents per gallon. All of these fees are required to be paid into the State treasury and passed to the credit of the general revenue fund of the State.

Section 9 provides that all fees received by the inspector shall, on or before the last day of each month, be paid into the State treasury by the inspector and shall be placed to the credit of the general revenue fund.

Section 7a provides that the State treasurer shall cause suitable stamps to be prepared for the enforcement of the act, the inspector giving his receipt therefor and being charged upon the books of the treasurer for the amount, and receiving credit against such charge for moneys paid in.

None of these so-called inspector's fees go to the inspectors, but into the State treasury. It is conceded by the 12th paragraph of the agreement of facts, page 64 of the record:

"That the entire expenditures authorized on account of the actual inspection, as provided by the act itself, amount to $12,500, and it is admitted, for the purpose of this case, that the inspection fees provided by the act annually collected upon beer sold in the State of Missouri, amount to $350,000, and that this is at least $337,500 in excess of the cost to the State for inspection."

And again it is admitted by paragraph 13 Id:

"That the fees chargeable under said act upon beer and malt liquors manufactured out of and brought into this State from other States and from foreign countries, for sale in the State of Missouri, exceed the total authorized cost to the State of the inspection approximately $60,000 a year."

The inspectors are paid salaries and such salaries, together with other incidental expenses for the enforcement of the act, as shown by the agreement of facts, cannot exceed, in the aggregate, $12,500 per year. These are paid out of the general fund of the State, and are provided for by the usual appropriation bills.

Indeed, it is a part of the history of this legislation, to be gathered from the Senate and House Journals, that it was introduced and regarded throughout as a revenue measure, without disguise at first, but afterwards attempted to be concealed under the disingenuous caption finally placed on the bill. While it is true that the debates on a bill are not resorted to to determine the meaning of an act, recourse may none the less be had to those debates as a part of the history of the time and to determine broadly what the purpose and object of the legislation was. As introduced in the house, originally, the bill, file No. 483, was entitled "An act creating the office of inspector of beer and malt

liquors and providing for the creation of a fund for the construction of roads and public highways." (See House Journal, 1899, p. 190.) The Senate bill, file No. 382, with one exception, was identical with the house bill, and was entitled "An act creating the office of inspector of beer and malt liquors and providing for the increase of the general revenue fund." (See Senate Journal, 1899, p. 386.) Notwithstanding the change in the title of the bill, as finally passed, it still retains the prominent and controlling features which induced the legislation, by securing to the general fund of the State the entire revenue to be derived from its operation. The general plan and purpose of the legislation as finally shaped in this statute are the same as when originally introduced in the House and Senate. The only thing which occurred which would transform that which was confessedly and avowedly a revenue measure into a mere inspection bill was the specious change in the title by striking out the words "and providing for an increase in the general revenue," and inserting in lieu thereof "and providing for the inspection of beer and malt liquors manufactured and sold in this State." The records of the House and Senate Journals upon the measure show that the members of the legislature understood the act as one providing for the increase of the revenues of the State, and that inspection was nothing more than a pretext for revenue. (See House Journal, 1899, pp. 278 and 452 and Senate Journal, 1899, pp. 610 and 620.)

It is also a part of the public history of Missouri that at this time the public revenues of the State were depleted and large appropriations for sustaining the public institutions of the State could not be met from any funds of the State, and a crisis in its financial affairs was at hand. To meet this emergency and to raise a fund without increasing the taxes upon the people, those intrusted with the State policy at the time devised this scheme of legislation. It is also worthy of observation that the legislature which

convened the following year and before revenue could be obtained from the beer bill, pursuing the same policy, passed a similar statute seeking to impose the same burdens upon the manufacture and sale of distilled liquors. The legislature, however, did not seek even to conceal the object of this last statute, and by the last section of the act declared an emergency to exist in the public revenues of the State and made the act immediately operative. By reason of this open avowal of legislative purpose, the illegality of the statute was so apparent that even the State circuit courts were bound to so hold, and this legislation last adverted to has never been put in force. There is no difference in principle, however, or in the object sought to be attained in these two statutes, and the only difference between the two was that the legislature put a different label on the bills. (See session acts 1901, p. 226.)

But the Supreme Court of the State held, none the less, by a divided Court, four to three, that the statute was not a revenue measure, but was simply an inspection bill passed under the police power of the State and represented a proper exercise of State power. The learned District Judge felt bound to accept this judicial declaration of the legislative purpose as coercive upon him, although his opinion indicates that he was not in accord with the conclusion of that Court. Further on, in the course of his opinion, it is suggested, page 46:

"The fact that a large revenue may incidentally result is not fatal to such a law, especially in respect to intoxicants."

He cites, as supporting his view, Cooley on Taxation (2nd ed.) p. 599, and State vs. Ludington, 33 Wis. 137. The citations are inapposite to the matter in hand. They relate to license fees and were dealing with the rule to be applied in regulating the amount of license which might be exacted for the sale of intoxicating liquors, and had no reference to interstate commerce. But this act was not

passed as a license measure. It has nothing to do with the general statutes of the State requiring license fees from those engaged in such business. It was not passed to restrict or in any degree regulate the sale of beer. The only pretext put forward to sustain the legislation is that it is an inspection bill designed to secure a pure and wholesome product. And this is so declared by the Supreme Court of the State. The right to sell, and regulations and restrictions concerning the sale of beer in Missouri are not found within the statute under review. They exist in an entirely independent body of legislation. This act confers no license and no privilege to sell. Complying with every provision of this law, and complying with this law alone, no man can pursue the calling of a brewer; neither can he bring his beer into the State for sale. It is vain to call that a license tax for which no license or privilege is granted. A person may deal in beer without paying this tax. The wholesale dealer in malt liquors, licensed to pursue his calling under other laws, may sell malt liquors whether he pays the inspection charges or whether they are paid by someone else. The charge having been paid by the brewer, the dealer may sell beer without let or hindrance so far as this law is concerned. Malt liquors once inspected may be sold and resold times without number without the payment of further charge. This act is not violated by any one selling beer without having paid for the privilege of doing so. Read from its beginning to its end nothing can be made of this statute except a most ingeniously contrived device to extract a large revenue from these brewers under the guise of an inspection law. There does, of course, exist upon the statutes of Missouri an independent body of legislation regulating the sale of intoxicating liquors in the State and providing for licensing vendors. The complainant and others similarly situated are compelled, of course, to pay these license fees, commonly known as dramshop license,

outside of and notwithstanding the inspection fees provided for by this act. They obtain their authority to engage in the business by virtue of these dramshop licenses. As to the amount of such license fees exacted, in compensation for this privilege of transacting business, the authorities cited by the learned Judge, in his opinion are applicable, but they manifestly have nothing to do with a case like the one presented here.

Neither is there anything in the suggestion that malt liquor is to be distinguished from all other merchantable commodities in respect of the extent of inspection fees which may be laid upon the product by the States in virtue of their police power. We are now referring, of course, to those States which recognize such liquors as a lawful subject of commerce. No distinction of the character sought to be drawn by the Court below, in its opinion, can be supported by any authority, but on the contrary a reference to the many decisions of this Court shows that intoxicating liquors and liquids where authorized as legitimate articles of commerce by the public policy of the State, are upon exactly the same plane as any other legitimate article of commerce in their relation to the commerce clause of the constitution, and are, therefore, subject to the same burdens and entitled to the same privileges. Thus in the License Cases, 5 How. 599, Mr. Justice Catron, speaking of the police power as reserved to the States and its relation to the power granted to Congress over commerce, said :

"The assumption is that the police power was not touched by the constitution, but left to the States as the constitution found it. This is admitted ; and whenever a thing, from character or condition, is of a description to be regulated by that power in the State, then the regulation may be made by the State, and congress cannot interfere. But this must always depend on facts, subject to legal ascertainment, so that the injured may have redress. And the fact must find its support in this, whether the prohibited article belongs to, and is subject to be regulated as part of,

foreign commerce, or of commerce among the States. If, from its nature, it does not belong to commerce, or if its condition, from putrescence or other cause, is such when it is about to enter the State that it no longer belongs to commerce, or, in other words, is not a commercial article, then the State power may exclude its introduction. And as an incident to this power, a State may use means to ascertain the fact. And here is the limit between the sovereign power of the State and the federal power. That is to say, that which does not belong to commerce is within the jurisdiction of the police power of the State ; and that which does belong to commerce is within the jurisdiction of the United States. And to this limit must all the general views come, as I suppose, that were suggested in the reasoning of this Court in the cases of Gibbons vs. Ogden, 9 Wheat. 1 ; Brown vs. The State of Maryland, 12 Wheat. 419 ; New York vs. Miln, 11 Pet. 102."

In Bowman vs. Chicago, etc. Ry. Co., 125 U. S. 465, at page 488, this Court quotes as follows from Gibbons vs. Ogden, 9 Wheat. 1, 203 :

"The object of inspection laws is to improve the quality of articles produced by the labor of a country ; to fit them for exportation ; or, it may be, for domestic use. They act upon the subject, before it becomes an article of foreign commerce, or of commerce among the States, and prepare it for that purpose."

And then the Court add :

"They are confined to such particulars as, in the estimation of the legislature and according to the customs of trade, are deemed necessary to fit the inspected article for the market by giving to the purchaser public assurance that the article is in that condition and of that quality which makes it merchantable and fit for use or consumption. They are not founded on the idea that the things, in respect to which inspection is required, are dangerous or noxious in themselves."

And the Court quotes further from Turner vs. Maryland, 107 U. S. 38, 55 :

"Recognized elements of inspection laws have always been—quality of the article, form, capacity, dimensions, and weight of package, mode of putting up, and marking and branding of various kinds—all these matters being supervised by a public officer having authority to pass or not to pass the article as lawful merchandise, as it did or did not answer the prescribed requirements. It has never been regarded as necessary, and it is manifestly not necessary, that all of these requirements should coexist in order to make a valid inspection law. Quality alone may be the subject of inspection, without other requirements, or the inspection may be made to extend to all of the above matters."

And then the Court observe in the opinion in the Bowman case:

"It has never been regarded as within the legitimate scope of inspection laws to forbid trade in respect to any known article of commerce, irrespective of its condition and quality, merely on account of its intrinsic nature and the injurious consequences of its use or abuse."

In Leisy vs. Hardin, 135 U. S. 100, 110, it was declared:

"That ardent spirits, distilled liquors, ale and beer are subjects of exchange, barter and traffic, like any other commodity in which a right of traffic exists, and are so recognized by the usages of the commercial world, the laws of Congress and the decisions of courts, is not denied."

And on page 114 the Court quotes, with approval, the language of Mr. Justice Matthews in the Bowman case (page 493):

"For the purpose of protecting its people against the evils of intemperance, it has the right to prohibit the manufacture within its limits of intoxicating liquors; it may also prohibit all domestic commerce in them between its own inhabitants, whether the articles are introduced from other states or from foreign countries; it may punish those who sell them in violation of its laws; it may adopt any measures

tending, even indirectly and remotely, to make the policy effective until it passes the line of power delegated to Congress under the Constitution. It cannot, without the consent of Congress, express or implied, regulate commerce between its people and those of the other States of the Union in order to effect its end, however desirable such a regulation might be."

While more recently, in Scott vs. Donald, 165 U. S. 58, 91, the Court took occasion to say:

"So long, however, as state legislation continues to recognize wines, beer and spirituous liquors as articles of lawful consumption and commerce, so long must continue the duty of the Federal Courts to afford to such use and commerce the same measure of protection, under the Constitution and laws of the United States, as is given to other articles."

It is clear from the foregoing citations that the exercise of the right of inspection necessarily carries with it a recognition of the quality of the article as commerce. The State does not possess the power, under the guise of inspection laws, to forbid trade in articles recognized by the public policy of the State as legitimate commercial commodities. Its jurisdiction in that behalf is to "fit the inspected article for the market by giving to the purchasing public assurance that the article is in that condition and of that quality which makes it merchantable and fit for use and consumption." And as shown from the foregoing decisions, the circumstance that the commodity because of its intrinsic nature, and not by reason of any lack of purity, as introduced into the market, may cause or tend to cause injurious consequences in its use or abuse, does not influence in the slightest the extent of the power of the State under its inspection laws.

This thought was most cogently put by Mr. Justice Burgess in his dissenting opinion upon this very same statute.

State vs. Bixman, 162 Mo., 60,
as follows:

"Revenue is never the object to be attained by inspection laws, nor to restrict the sale of the commodity inspected, but they are for the protection of the people from fraud and imposition in certain articles in use, and to promote health and advance morals; and the character of the article inspected—whether its use as a beverage or otherwise be demoralizing or not,—is of no significance, in so far as the fee to be charged therefor is concerned; for, whatever may be its character, nothing more than a reasonable fee for the labor and cost attending the inspection has ever been, or can be, allowed therefor. And, in so far as I am concerned, I have been unable to find an authority to the contrary. Nor do I believe that one can be found."

And the learned judge quotes the following language from Mr. Justice Field, in the Munn case (94 U. S., 146):

"One may go, in like manner, through the whole round of regulations authorized by legislation, State or municipal, under what is known as the police power, and in no instance will he find the compensation of the owner for the use of his property has any influence in establishing them."

The foregoing citations and authorities demonstrate the fallacy involved in the opinion of the Court below in assuming a distinction to exist between the power of the State in regulating inspection fees as related to intoxicating liquors and inspection fees as related to other articles of commerce. No such distinction exists. To tolerate it and to confer upon the state an unbridled license to fix charges at its mere whim and caprice and without reference to the cost of the inspection would be to permit the State to accomplish indirectly what it undoubtedly has not the power to do openly and directly. It could bring about exactly the condition pointed out by Justice Catron, and under the guise of an inspection measure so burden interstate commerce in the

commodity as to make it impossible. The premise of the Court, therefore, being at fault, its conclusion in support of that branch of its opinion is likewise erroneous.

Intoxicating liquors, then being subjects of lawful commerce in the State of Missouri, the State in imposing an inspection fee under its reserved power, is bound by the rule that the charge for such inspection must bear a just and reasonable relation to the cost of making the same. In Hopkins vs. U. S., 171 U. S., 578, 597, Mr. Justice Peckham said :

"In all the cases which have come to this Court, there is not one which has denied the distinction between a regulation which directly affects and embarrasses interstate trade or commerce and one which is nothing more than a charge for a local facility provided for the transaction of such commerce. On the contrary, the cases already cited show the existence of the distinction and the validity of a charge for the use of the facility."

"No State can interfere with interstate commerce through the imposition of a tax by whatever name called, which is, in effect, a tax for the privilege of transacting such commerce."

Adams Express Co. vs. Ohio, 166 U. S. 185, 218.

But in the light of the recent cases of

Telegraph Co. vs. Borough of New Hope, 187 U. S. 419 ;

Atlantic etc. Telegraph Co. vs. Philadelphia, 190 U. S. 160 ;

Postal Telegraph Co. vs. Bourough of New Hope 192 U. S. 55.

Postal Telegraph Co. vs. Taylor, Id. 64.

The proposition must be accepted as authoritatively settled against the right of the State of Missouri to impose, under the guise of an inspection fee, a burden upon inter-

state dealing in this commodity representing, approximately, thirty times the cost of making such inspection. In the last mentioned case this Court held:

"A license fee cannot be imposed by ordinance of a municipality for purposes of inspection on telegraph companies doing an interstate business which is so far in excess of the expenses of inspection that it is plain that it was adopted, not to repay such expenses, but as a means for raising revenue."

There, extravagant as the charge was, compared with the amount which might have been or could possibly be incidental to the inspection, the disparity was not so gross as in the case at bar. On page 72 the Court said:

"When we come to an examination of the grounds upon which this kind of a tax is justifiable, and when we find that in this case each one of these grounds is absent, how is it possible to uphold the validity of such an ordinance? To uphold it in such a case as this, is to say that it may be passed for one purpose and used for another; passed as a police inspection measure and used for the purpose of raising revenue; that the enactment as a police measure may be used as a mere subterfuge for the purpose of raising revenue, and yet because it is said to be an inspection measure, the Court must take it as such and hold it valid, although resulting in a rate of taxation which if carried out throughout the country would bankrupt the company were it added to the other taxes properly assessed for revenue and paid by the company. It is thus to be declared legal upon a basis and for a reason that do not exist in fact. * * * Under such facts it would seem to be plain that the ordinance was adopted as a means for the raising of revenue, and not to repay expenses for inspection.

"Judging the intention of the borough by its action it did not intend to expend anything for an inspection of the poles and wires, and did intend to raise revenue under the ordinance. Courts are not to be deceived by the mere phraseology in which the ordinance is couched when the action of the borough set forth in the affidavit shows con-

clusively that it was not passed to repay the expenses or provide for the liabilities incurred in the way of inspection or for proper supervision."

Here the extent of the service to be performed by this small congress of inspecting officers of the State, under the statute as construed by the lower court, consists in affixing to the package a stamp or label—for all practical purposes no inspection at all—and which represents, practically, no cost, as compared with the revenue exacted.

NO PRACTICAL INSPECTION IS FURNISHED BY THE ACT.

And this brings us to the second objection which we have to this act, heretofore adverted to, namely: That as construed by the Court it is no inspection at all. The mere receipt of an affidavit of the importer, or someone else having knowledge of the beer, or who avers that he has knowledge, of the ingredients of the beer, is the beginning and the end of the inspection permitted by the statute. The Court was driven, by the force of the otherwise tenable objections to the act, to thus minimize the duties and powers of the executive officers of the State. But it is to be observed that there is not lodged in the officers the power of revision of the truth of these affidavits nor of excluding the commodity if it does not come up to the requirements of the act. The entire penal provisions of the statute are to be found in Section 10, and these penalties are confined to imprisonment and forfeiture of license, not for the introduction or sale of impure beer, but for failure to produce the affidavit and to pay the fees. No penalty is affixed for the making of a false affidavit, nor, as we have suggested, is any power reposed in any department of the State to prevent the vending of beer which may be absolutely unwholesome and unfit to drink.

It will be observed from the provisions of Section 5 of the act that there is no *entrepot* designated or location within which the article brought into the State shall pass,

thus leaving the entire borders of the State open for entry and thus manifestly making it wholly impossible for an inspector to know anything of the presence of the article in the State. Neither is there any requirement that he shall be informed as to where it is or where it may be inspected. While an affidavit is required from the party who brings the article into the State, or offers to sell it within the State, there is manifestly no just relation between the act of bringing in and the ultimate purpose of the affidavit, for the apparent reason that the affidavit may be made as to the intention to bring in, or as to an article already within the State, and yet the article itself may in no way relate to or be identified with the conclusion of the affiant in his affidavit, and there is no way by which the inspector can know that the affidavit sent in has any relation to the article actually brought into the State.

The forced construction which was placed by the learned Judge upon this statute in order to save its face among legislative enactments, strongly exemplifies the absurdity of dignifying this as an inspection measure. Under such construction the inspector may, after receipt of an affidavit, "label the package," which is defined by the Court to mean the outer receptacle or the original package which incloses the commodity, as shipped into the State. In the case of bottled goods, therefore, it would be a wooden box, probably closed. The inspector, the Court holds, would have no right to pry open this box to satisfy himself that it did, in fact, contain only the article described in the affidavit. His inspection must, perforce, be confined to a visual examination of the pine-board covering submitted to him by the accommodating vendor. To seriously characterize as an inspection of beer the act of an officer in licking a label and sticking it on a wooden box, without even a permissive sight of the beer itself, is the reduction of all absurdities.

Being thus shorn of all power of inspection and of all right to accomplish any actual work in securing a wholesome product, it may readily be conceived that the inspector and his deputies would become exceedingly lax in the performance of those purely ornamental functions with which they are endowed by the statute.

Let us suppose a practice that is permissible under this act, and which is best illustrated by the practice actually adopted by the inspector: A foreign brewer at Milwaukee, Wisconsin, desires to ship to Kansas City, Missouri, to be sold by his agents after arriving there, one thousand barrels of bottled beer. He may make affidavit in the State of Wisconsin and forward it to the inspector at his office in Missouri, stating that he has shipped the thousand barrels of bottled beer into the State of Missouri and will offer them for sale, and at the same time transmit to the inspector the amount of the inspection fees demanded, and the inspector in turn forwards to whomsoever the manufacturer requests, the labels to be placed upon the barrels, and they are actually placed thereon by the manufacturer or his agent. How can it be said that any inspection has been made which meets any of the requirements or purposes of inspection laws? It will be noticed that this act is careful in its silence upon the question as to what the inspector shall do in the way of inspecting. The act of putting the labels upon the package is altogether possible, but it certainly could not lie in his power, even if the act had so provided, to break open the bottles or to open the keg containing beer, for the purpose of extracting the contents for inspection. This would, obviously, ruin and destroy the article itself, and thus we find that the act is careful to not advise the inspector as to the character of his inspection. The most that could be claimed for it, even if the inspector actually discommoded himself (which he does not do), to the extent of going and looking at the package, barrel or case, would be a mere empty formality, and of no practical use, because

of absence of power to make actual inspection. Would this be regarded as an inspection such as a police regulation would require? Certainly not. Therefore, it is apparent that the object of this act was to put revenue into the State treasury and to disguise it by calling it "inspection," when it was known and understood that no inspection was expected or intended.

The unquestioned result of this pretense of inspection is, in its last analysis, to require the party who offers the commodity for sale to be the sole judge of the subject and to be the sole judge as to whether his conclusion is correct, namely: that no material other than pure hops, extract of hops, or pure barley, malt or wholesome yeast or rice, was used in the manufacture; and if his conclusion should satisfy him sufficiently to warrant the making of an affidavit, the inspection is complete and nothing remains for the inspector to do but go through the form of seeing that the label is placed upon the package, or, perhaps, perform the laborious act of actually looking at the barrel or package containing the article. If this be inspection then it would be difficult to define the antithesis of inspection.

In short, there is not an attempt, even, within the entire texture of this statute to secure to the public the commonly accepted end and object of all inspection laws. The lower court itself was so impressed with the illogical and absurd result of defining this as an inspection measure, that it was moved to observe, "I suspect that the legislature was more concerned in the matter of obtaining fees to swell the exchequer of the State than in the protection of the people who might drink beer."

The Court, however, notwithstanding the plain and palpable evasion and equivocation manifested by the statute, proceeds to say that, granted this to be true, it does not lie in the mouth of the foreign brewer to complain. But in assuming this position the Court misses, as it seems to us, the touchstone in this case. We complain not because the

State has laid its hand with gentleness upon the foreign brewer in so far as making a physical examination of his product is concerned. Nor do we complain particularly because of the fact that an affidavit may be accepted in lieu of inspection, without punishment or penalties for perjury. The ground of the complaint is that under a bill disguised and sugar-coated in these particulars as an inspection measure, but bearing no just relation to the object of inspection, an extravagantly large tax is laid upon our commerce. And it does not answer the argument of the complainant to say that the legislature has so minimized the details of the inspection, so-called, as to make it, to all practical intents and purposes, no inspection at all. If the act as construed and enforced by the State authority is not calculated to secure the results to be attained by proper inspection, then it furnishes no pretext for imposing this large tax upon the foreign brewer. *The obligation of the brewer to pay an inspection fee at all cannot arise except in the event of inspection in fact.* No non-resident trader in any commodity is obliged to pay tribute to the States for immunity of his products from inspection.

So far then from weakening the position of the complainant, it seems to us that the suggestion of the learned Judge strongly emphasizes the insincerity of the claimed purpose of this legislation and shows the justice of our complaint. How can that be said to be an inspection law, or a sanitary law, which does not secure information as to the wholesomeness of the commodity, provide for its exclusion if found to be unwholesome or affix a punishment for the false representation of quality or condition or for the sale of an impure and adulterated article? Can it be seriously contended that a State has any sincere purpose to protect the public welfare in this behalf by the passage of a law which wholly omits these safeguards and means of rendering the statute effective, and leaves its operation dependent entirely upon the good faith and honesty of those who may happen to be engaged in the business?

In Vance vs. Vandercook Co. (No. 1) 170 U. S. 438, 456, it was urged that the sending of a sample of wine to the state officer in advance of shipment and as a prerequisite for obtaining permission to make a shipment, should be upheld as an inspection law passed for the purpose of guaranteeing the purity of the product, and therefore should be construed to be a valid manifestation of the police power of the State. The Court disposed of this contention in the following language (p. 456):

"But it is obvious that this argument is unsound, as the inspection of a sample sent in advance is not in the slightest degree an inspection of the goods subsequently shipped into the State. The sample may be one thing and the merchandise which thereafter comes in another. It is hence beyond reason to say that the law provides for an inspection of the goods shipped into the State from other States, when in fact it exacts no inspection whatever."

By parity of reasoning it might have been said in that case that the good faith of the shipper was pledged to maintain the quality of the sample in the subsequent shipment. Certainly such observation is as pertinent to the South Carolina statute as to the Missouri act, as each is made entirely dependent for effectiveness upon the honesty and good faith of the shipper. Notwithstanding, this Court refused to consider the act as an inspection measure. The Court, doubtless, proceeded upon the obvious principle that when the State enacted a statute with the real object of insuring purity of liquors manufactured or sold in the State, it would furnish means more calculated to accomplish that result than a mere appeal to good faith and integrity of the foreign dealer.

As was said by this Court in Mugler vs. Kansas, 123 U. S. 623, 661: "If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights

secured by the fundamental law, it is the duty of the Courts to so adjudge and thereby give effect to the Constitution."

Said this Court in the later case of Scott vs. Donald, 165 U. S. 93:

"In Railroad Co. vs. Husen, 95 U. S. 465, the validity of an act of the State of Missouri, which forbade the introduction into the State of any Texan or Mexican cattle between the months of March and December of each and every year, was considered.

"It was contended on behalf of the law that it was valid as a quarantine or inspection law, as its purpose was to prevent the introduction of cattle afflicted with contagious diseases. But the Court pointed out that no provision was made for the actual inspection of the cattle, so as to secure the rejection of those that were diseased, but that all importation of cattle, whether sound or diseased, was forbidden for long periods; and it was held that the statute was void as a plain intrusion upon the exclusive domain of congress."

In Reid vs. Colorado, 187 U. S. 150, 151, this Court said:

"Certain principles are well settled by the former decisions of this Court. One is that the purpose of a statute, in whatever language it may be framed, must be determined by its natural and reasonable effect. Henderson vs. Mayor of New York, 92 U. S. 259, 268. Another is that a State may not, by its police regulations, whatever their object, unnecessarily burden foreign or interstate commerce. Railroad company vs. Husen, 95 U. S. 465, 472. Again, the acknowledged police powers of a State cannot legitimately be exerted so as to defeat or impair a right secured by the National Constitution, any more than to defeat or impair a statute passed by Congress in pursuance of the powers granted to it. Gibbons vs. Ogden, 9 Wheat. 1, 210. Missouri, Kansas & Texas Ry. Co. vs. Haber, 169 U. S. 613, 625, 626, and authorities cited."

The Court held that the right of one to introduce into a State live stock infected with a communicable disease

is not protected or guaranteed by the Federal Constitution. But none the less clearly held that the State cannot, under the guise of protecting against the introduction of such infected animals, unreasonably burden shipments of live stock into and through Colorado. In other words, the means employed must not go beyond the necessities of the case. So here, the right of the State founded upon its police power is to secure the people against impure and adulterated beer. The means to be employed must be consonant with the end to be attained. What are these means? Obviously and primarily they must be such as will secure to the executive officers of the State, information as to the quality of the commodity, which, we submit, can only be obtained by a test or an inspection. Then, as a necessary correlative of that right, there must be a further power to prohibit the sale of the condemned articles. Neither of these rights—absolutely necessary to the accomplishment of the end professed—is furnished by this statute. Finally, having provided for the means of inspection, the State may then impose a sufficient burden, in the way of charges, to meet the cost of the work. But under the admitted facts in this case it has exacted of these brewers thirty times the combined salaries and expenses of this small army of officials whom it has created, without the power of accomplishing anything under the professed objects of the legislation. There can be no other conclusion than that this act wholly fails to meet the requirements of an inspection measure.

THE ABSENCE OF UNFAIR DISCRIMINATION AGAINST NON-RESIDENT DEALER IS IMMATERIAL.

Neither is it any answer to the position of the complainant to say that in respect to the operation of the act there exists no discrimination adverse to the complainant and other non-residents of the State in favor of the domestic manufacturers and dealers. If the burden is imposed upon

interstate commerce, without justification, it is none the less invalid because it may rest alike upon those within and without the State.

"A burden imposed by a State upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the States, including the people of the State enacting such statute." Minnesota vs. Barber, 136 U. S. 326.

Citing:

Robbins vs. Shelby Taxing District, 120 U. S. 489, 497;

Case of the State Freight Tax, 15 Wall. 232.

III.

THIS COURT NOT BOUND BY THE DECLARATION OF THE SUPREME COURT OF MISSOURI THAT THE ACT IS AN INSPECTION MEASURE PASSED PURSUANT TO THE POLICE POWER OF THE STATE.

The Supreme Court of the State, by the narrow margin of four to three, declared the act to be an inspection law and to be within the proper exercise of the police power of the State. The learned District Judge conceived himself to be bound by this judicial declaration, and therefore to be not at liberty to express his independent judgment upon this subject. We respectfully suggest that in this he was in error. The question is not to be confused with the rule making the construction of State statutes by the State Courts binding upon the federal judiciary, because the application by the State tribunal of facts to the act or a judicial declaration of its purpose or object is not a construction of the act within the terms of that rule. The distinction is well illustrated in the case at hand. The Supreme Court has held that the inspector does not possess authority to break open packages or bottles and physically test the beer in its then condition. This construction of the

power of the inspector, under the statute, is binding on the federal court. But it is a totally different thing when it comes to defining the legislative purpose evidenced by the act, as distinguished between a revenue and inspection measure. That is a subject about which this Court must necessarily express an independent judgment. It cannot be bound by the terms which the State Court may be pleased to apply to the legislative intent without losing its power of protecting against an encroachment upon federal rights.

"This Court is not bound by the decision of the highest Court of the State in which such a tax is authorized and imposed, that its authorization and imposition are an exercise of the police power, and not of the taxing power."

Brennan vs. Titusville, 153 U. S. 289.

In Scott vs. Donald, 165 U. S. 100, this Court put at rest any doubt upon its right of independent judgment and declared:

"The question whether a given State law is a lawful exercise of the police power is still open, and must remain open, to this Court."

THE COURT WILL EXERCISE ITS INDEPENDENT JUDGMENT AS TO MEANING AND EFFECT OF STATUTE.

Said this Court in Postal Telegraph Co. vs. Taylor, 192 U. S. 64:

"Courts are not to be deceived by the mere phraseology in which an ordinance may be couched, when it appears conclusively that it was passed for an unlawful purpose and not for the one stated therein."

In People vs. Compagnie Générale Transatlantique, 107 U. S. 59, 63, it is most aptly said:

"A State cannot make a law designed to raise money to support paupers, to detect or prevent crime, to guard against disease, and to cure the sick, an inspection law,

within the constitutional meaning of that word, by calling it so in the title."

"In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect; and the presumption that it was enacted in good faith, for the purpose expressed in the title, cannot control the determination of the question whether it is, or is not, repugnant to the constitution of the United States."

Minnesota vs. Barber, 136 U. S. 313.

In Brennan vs. Titusville, (*supra*) this Court said (p. 301):

"Because a license may be required in the exercise of the police power, it does not follow that every license rests for its validity upon such police power. A State may legitimately make a license for the privilege of doing a business one means of taxation, and that such was the purpose of this ordinance is obvious, not merely from the fact that in the title it is declared to be for 'general revenue purposes,' but also from the further fact that, so far as we are informed by any quotations from or references to any part of the ordinance, there is no provision for any supervision, control or regulation of any business for which by the ordinance a license is required. In other words, so far as this record discloses, this ordinance sought simply to make the various classes of business named therein pay a certain tax for the general revenue of the city."

"The fact that the State or the Court may call the business of an individual, when employed by more than one person outside of the State, to sell their merchandise upon commission, a 'brokerage business,' gives no authority to the State to tax such a business as complainants'. The name does not alter the character of the transaction, nor prevent the tax thus laid from being a tax upon interstate commerce. As was said by Mr. Justice Bradley, in the Robbins case, *supra*, 'The mere calling the business of a drummer a privilege cannot make it so.'"

Stockard vs. Morgan, 185 U. S. 36.

The Supreme Court of Missouri itself has recognized that a tax is not to be denied its legal significance because denominated something else in the law enacted. In City vs. Spiegel, 75 Mo. 145, the Court said (146):

"Is, then, the license fee a tax within the meaning of the third section, *supra?* And does the ordinance which authorizes its collection discriminate in favor of some subjects and against others of the same class? That the license fee is a tax when imposed for the main purpose of revenue, is established by abundant authority. Dillon Munic. Corp. par. 768; Ward vs. Maryland, 12 Wall. 418; Cooley's Const. Lim. pp. 201, 494; North Hudson vs. Hoboken, 41 N. J. L. 71; Glasgow vs. Rowse, 43 Mo. 479; Cooley on Taxation, 403, *et seq.*, and it is competent for the Courts to make examination and see if, under a mere power to license, the power of taxation for revenue is exercised. Burlington vs. Ins. Co., 31 Iowa 102; Muhlenbrinck vs. Commissioners, 42 N. J. L. 364; s.c., 36 Am. Rep. 518. In this case it is apparent at first blush that the license fee is imposed for the purpose of revenue. That such fee is imposed for the purpose of regulation does not deprive it of the salient characteristics of a tax."

It therefore is clearly the duty of this Court to determine for itself the rightfulness of the exercise of the police power attempted by the legislature of Missouri, and it is to be governed in its decision by the manner in which the act, as construed by the State Court, is administered, and the result of such administration upon the business of the non-resident dealer. It is not to be deceived as to the real object and purpose of the statute by any false label in the title of the act. It is to determine the legal conclusion deducible from those facts and circumstances, irrespective of the judgment of the State Courts upon the question of the propriety of the legislation or the means and purposes in view when it was passed. If it appears to this Court that the act has no reasonable relation to the police power of the State, but that the title and avowed purpose are a mere

cloak for the real object of the legislation, and that the act as construed and administered is an unreasonable burden upon interstate commerce, then this Court will so declare.

IV.

THE WILSON BILL (ACT OF CONGRESS OF AUGUST 8, 1890,) DOES NOT AUTHORIZE A STATUTE LIKE THE ONE IN QUESTION.

In view of the many decisions of this Court sustaining the principles adverted to in the earlier portions of this argument, there would seem to be no reasonable room for controversy that the Missouri statute, in so far as its application to the business of the complainant is concerned, is an invasion of rights secured by the Federal Constitution, unless the power to pass such a statute has been conferred upon the State by the Wilson bill. As applied to any other kind of merchantable commodity there can be no doubt that the act is an unreasonable burden upon interstate commerce and cannot be sustained as being within the police power of the State. Does the Wilson bill deny to the complainants, as dealers in beer, the same protection? The Supreme Court of Missouri, without argument or any extended discussion, held that it did. State vs. Bixman, 162 Mo. 38. The Court cites as authority for its contention *In Re* Raher, 140 U. S. 545; Rhodes vs. Iowa, 170 U. S. 412, and Vance vs. Vandercook, 170 U. S. 445.

Before proceeding to a discussion of this act and the authorities, it may be useful for us to first state what we believe to be the effect of the Wilson bill upon the power and right of States in dealing with intoxicating liquors, as will be gathered from the decision of this Court.

The act did not create a right in the States, nor delegate to them a power which they did not theretofore possess, but simply removed an impediment to the exercise of an existing power. This power of the State, to which alone

the right to enact legislation of this character is referable, is the police power. The effect of the act of Congress is then to "remove an impediment to the enforcement of the State law passed in pursuance of its police power, in respect to imported liquors, at a time earlier than such State laws would otherwise be enforceable." Beer still remains an article of commerce and the right to make and vend it is recognized, and the State may interfere with the interstate dealing in the commodity only in virtue of a statute enacted pursuant to its police power. In Missouri, where it is a lawful subject of sale by licensed vendors, the State does not possess the power, while such right exists, to deny the privilege of commerce and traffic altogether in the article, or to interfere or hamper the same beyond the necessary exercise of its power of regulation and control. The statute of Missouri in question, therefore in order to be upheld, must be a statute passed pursuant to its reserved right of control. Its power in that behalf being neither diminished nor augmented by the Wilson bill, the question of the rightfulness of its attempted exercise is to be determined by the same considerations which would have governed if under investigation before the Wilson bill was passed. In other words, it must be determined upon entirely independent grounds, and upon the same principles as when applied to any other legitimate article of commerce. We, therefore, contend that the Missouri act is not a lawful exercise of the police power of the State, and if it is not, the Wilson bill does not deprive the complainant of the protection secured to it by the Federal Constitution. Let us examine the statute and the decisions a little more fully.

The federal statute is as follows:

"That all fermented, distilled or other intoxicating liquors or liquids transported into any state or territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such state or territory be subject to the operation and effect of the laws of such state or

territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." 26 Stat. 313, c. 728.

The act itself would seem to remove all room for fair controversy as to its meaning. It provides that intoxicating liquors upon arrival in the state or territory shall be subject to the operation and effect of the laws of the state or territory "*enacted in the exercise of its police powers.*"

In Bowman vs. Chicago etc. Ry. Co. 125 U. S. (*supra*) it was decided that the State did not possess the power to interfere with the interstate shipment until the point of arrival and delivery to the consignee. The question was reserved whether such shipment continued to be protected by the interstate commerce clause after delivery to the consignee and up to and including the time of sale in the original package by the owner, to whom they had been consigned. Subsequently in Leisy vs. Hardin, 135 U. S. 100, the question reserved in the Bowman case arose for adjudication, and it was then held that the right to sell imported merchandise in the original package, free from interference by the State, was protected by the constitution, as up to such sale, the goods brought into the State were not commingled with the general mass of property in the State. Both of these cases were decided before the act of 1890. Later in Rhodes vs. Iowa, 170 U. S. 412, the exact question involved in the Bowman case was again presented for consideration, it being claimed that the act of 1890 had the effect of changing the rule announced in the prior decision. This Court, however, held the contrary and decided that notwithstanding the act of 1890 an interstate shipment of intoxicating liquor could not come within the operation of the laws of Iowa until its delivery to the consignee, and

the scope of the decision is concisely stated in the succeeding case of Vance vs. Vandercook, 170 U. S. 446, as follows:

"In the second case the same view was taken of the statute, and although it was decided that the power of the State did not attach to the intoxicating liquor when in course of transit and until receipt and delivery, it was yet reiterated that the obvious and plain meaning of the act of Congress was to allow the State laws to attach to intoxicating liquors received by interstate commerce shipments before sale in the original package, and therefore at such a time as to prevent such sale *if made unlawful by the State law.*"

In the case last mentioned the Court deems it proper to state three propositions, which are conceded to be elementary and to be entirely concluded by authority of previous decisions of the Court, as follows:

"(a) Beyond dispute the respective States have plenary power to regulate the sale of intoxicating liquors within their borders, and the scope and extent of such regulations depend solely on the judgment of the lawmaking power of the States, provided always, they do not transcend the limits of State authority by invading rights which are secured by the constitution of the United States, and provided further, that the regulations as adopted do not operate a discrimination agaist the rights of residents or citizens of other States of the Union.

"(b) Equally well established is the proposition that the right to send liquors from one State into another, and the act of sending the same, is interstate commerce, the regulation whereof has been committed by the constitution of the United States to Congress, and, hence, that a State law which denies such a right or substantially interferes with or hampers the same, is in conflict with the constitution of the United States.

"(c) It is also certain that the settled doctrine is that the power to ship merchandise from one State into another carries with it, as an incident, the right of the receiver of the goods to sell them in the original packages, any State

regulation to the contrary notwithstanding, that is to say, that the goods received by interstate commerce remain under the shelter of the interstate commerce clause of the constitution, until by a sale in the original package they have been commingled with the general mass of property in the State.

"This last proposition, however, whilst generically true, is no longer applicable to intoxicating liquors, since Congress in the exercise of its lawful authority has recognized the power of the several States to control the incidental right of sale in the original packages, of intoxicating liquors, shipped into one State from another, so as to enable the States to prevent the exercise by the receiver, *of the accessory right of selling* intoxicating liquors in original packages except in conformity to lawful State regulations. In other words, by virtue of the act of Congress the receiver of intoxicating liquors in one State, sent from another, can no longer assert a right to sell in defiance of the State law in the original packages, because Congress has recognized to the contrary."

And the Court further remarked at pages 445-6 that the scope and effect of this act of Congress have been settled in *In Re* Rahrer, 140 U. S. 545, and Rhodes vs. Iowa, 170 U. S. 412, declaring the purpose of Congress in passing the law to have been to allow State laws to operate on liquor shipped into one State from another, so as to prevent the sale in the original packages in violation of the State laws.

The right, then, which was taken from the interstate dealer by the withdrawal of the impediment to the operation of the police powers of the State, is the right to sell in the original packages. Only that and nothing more. He may ship his goods, without molestation, into or through the State. Up to the point of their delivery to the consignee they are free from interference by the State's authorities. The article is none the less a legitimate subject of commerce because of the act of Congress and to support its

interference with a right of sale, the State legislation must flow from its reserve police power. It is true, of course, that the right of the State founded upon this power, is extremely broad and elastic and it extends even to the right of an absolute prohibition of the sale altogether. But there does none the less exist this important limitation, namely: That however varied the manifestations of the power may be, they must, after all, relate to and regulate or control the introduction and sale of the commodity; as for example, rules for inspection and license fees, control of the place and hours of sale, all of which are within the realm of such power. But in the language of this Court in Scott vs. Donald, 165 U. S. 91:

"So long, however, as State legislation continues to recognize wines, beer and spirituous liquors as articles of lawful consumption and commerce, so long must continue the duty of the Federal Courts to afford to such use and commerce the same measure of protection, under the constitution and laws of the United States, as is given to other articles."

This same thought runs throughout the case of Vance vs. Vandercook. Thus, at page 448, it was said:

"The entire context of the act manifests the purpose of Congress to give to the respective States full legislative authority, both for the purpose of prohibition as well as for that of regulation and restriction, with reference to the sale in original packages of intoxicating liquors brought in from other States."

And again, on page 447:

"The right of a State to forbid the sale of liquors in the original packages being clear, it results that a State law cannot be void because in excess of State authority, when it is but the execution of a power lawfully vested in the legislature of the State."

In Reymann Brewing Co. vs. Brister, 179 U. S. 445, 455, this Court said, referring to the Dow law of Ohio:

"As this statute subjects intoxicating liquors imported into a State to the operation and effect of the laws of such State only when enacted in the exercise of its police powers, it is contended that such is not the character of the Dow law; that as it contains no prohibition upon the manufacture or sale of intoxicating liquors, and only purports to regulate the trafficking therein, it is not a police measure."

The Court analyzed the Ohio statute and found that the objection to it was not tenable and held that the Dow law was a proper exercise of police power of the State. But the entire logic and force of the opinion sustains our contention of the necessary scope and purpose of the Wilson bill.

Mr. Justice Miller in his work on the constitution, page 676, after this act took effect, said in reference to it:

"Such liquors introduced into the State from another State, whether in original packages or otherwise, become subject to the operation of its then existing laws, enacted in the exercise of its police powers."

This, likewise, is the view which has obtained in the Circuits in respect to this act. Pabst Brewing Co. vs. Terre Haute, 98 Fed. 330, presented an ordinance requiring the payment of a license fee of $1,000 per annum upon a depot or agency for the storage of beer imported from another State. After discussing all of the other questions in the case, the Court held, referring to the decisions of this Court, (p. 333):

"The constitutional power of Congress to enact the statute in question was upheld, and it was declared to have been the purpose of Congress to allow the laws of the State to operate on intoxicating liquors shipped from one State into another, so as to prevent their sale in the original packages in violation of any police law of the State."

On page 334 the Court then inquired whether the ordinance was a valid exercise of the police power, and

disposed of the claim against the contention of the city. Said the Court:

"The controlling question, then, is this: Is the law authorizing the city of Terre Haute by ordinance to impose a license of $1,000 per annum upon a depot or agency for the storage of beer imported from another State while in original packages enacted as a police or revenue regulation? The right of the shipper of beer to sell the same in the original packages, 'shall, upon arrival in such state or territory, be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers.' Was the statute of this State authorizing the imposition of the license upon depots or agencies for the storage of imported beers in original packages enacted in the exercise of its police power, or under its power of taxation? If under the power of taxation, it would be invalid as to citizens of other States, even though valid as to citizens of this State. In Brennan vs. City of Titusville, 153 U. S. 289, 301, 14 Sup. Ct. 832, 38 L. Ed. 719, the Supreme Court say:

"'Because a license may be required in the exercise of the police power it does not follow that every license rests for its validity upon such police power. A statute may legitimately make a license for the privilege of doing a business one means of taxation: and that such was the purpose of this ordinance is obvious, not merely from the fact that in the title it is declared to be for general revenue purposes, but also from the further fact, so far as we are informed by any quotations from or references to any part of the ordinance, there is no provision for any supervision, control, or regulation of any business for which, by the ordinance, a license is required. In other words, so far as this record discloses, this ordinance sought simply to make the various classes of business named therein pay a certain tax for the general revenue of the city.'

"The Court held the ordinance void on the ground that it was enacted under the taxing, and not under the police, power of the State, affirming the doctrine of the case of Ficklen vs. District, 145 U. S. 1, 12 Sup. Ct. 810, 36 L. Ed. 601:

"'That no State can levy a tax on interstate commerce in any form, whether by way of duties laid on the transportation of subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on.'"

And on page 335 it said:

"The power to tax is distinct from the police power. The purpose of the former is revenue, of the latter regulation. Any statute or ordinance enacted under the police power of the State must have some relation to the peace, good order, health, morality or security of the people. It must contain some provision having reference to the supervision, control, or regulation of some act or thing which may in some way injuriously affect the peace, good order, health, morality, or safety of society. The ordinance in question contains no provision for any supervision, control, or regulation of the business of handling, storing or selling beer, nor any provision for the supervision, control, or regulation of the depot or agency in which it is stored. Exacting a license from the owner of the depot or agency where beer is stored does not, so far as the Court can see, have any necessary relation to the peace, good order, health, morality, or security of society, in the absence of any provision for the control, regulation, or supervision of such depot or agency. In other words, so far as this record discloses, this ordinance seeks simply to make the depot or agency where beer is stored pay a tax for the general revenue of the city, without any attempt to control, regulate, or supervise either the depot or agency, or the custody or sale of the beer."

So likewise Judge Simonton, in *Ex parte* Jervey, 66 Fed. 957, held:

"The Wilson act, passed by Congress in August, 1890, merely operates to subject liquors brought into a State to the police power thereof, whether in the original packages or not, and it gives the State no authority to impose penalties upon persons who bring liquors into a part of the State without attempting to unload them from the vessel."

Judge Hook, *In re* Bergen, 115 Fed. 339, 342, said of this act:

"It simply removed an impediment to the operation of the police laws of the State, respecting the imported property, which theretofore existed by reason of the silence of Congress upon that subject."

See also:

Minneapolis Brewing Co. vs. McGillivray et al, 104 Fed. 258.

It must be borne in mind that the goods of the non-resident owner, at the time they are impressed with the payment of this inspection fee, have not become a part of the general property of the State. The interstate commerce is affected by the statute long before the commodity is in the act of being sold or even ready for sale. The statute operates upon it immediately upon its reaching the borders of the State. The goods are in the hands of the agent of the non-resident owner and to all intents and purposes are exactly in the same position and relation to the laws of the State of Missouri, as if they were still in the warehouses where they were originally manufactured. There is no prohibition against their introduction and sale. Being, therefore, clearly interstate merchandise, lawfully brought into the State and not commingled with the merchandise of the State, the effect of the statute is not to regulate the sale either in original packages, or otherwise, but is rather an exaction of a tax upon the business of dealing in an interstate commodity, under the guise of an inspection law. This makes it a palpable regulation of that commerce, and it would be no more a regulation repugnant to the constitution if the officers of the State of Missouri should appear in Milwaukee or wherever else the beer may have been manufactured, and should attempt to exact the same fees there.

But it may be suggested that inasmuch as the States

have the power of prohibiting the liquor traffic altogether, upon the principle that the greater includes the less, they may do anything short of prohibition and this statute is to be sustained on analagous grounds. In other words, that the State may impose such burdens on the commerce as it pleases, and the interstate dealer is in no position to complain. It is to be conceded that this argument has a captivating and plausible sound, but a study of it proves it to be fallacious and that it misses the point involved. In the first place the act of prohibition is along the line of regulation. It is, in fact, one method of dealing with the liquor problem which confronts the municipalities, but even there it is a regulation of the subject of sale of the article. It presents a clear case of the exercise of the police power of the State, and the Wilson bill has removed the impediment to its exercise even to this extreme limit. In this particular lies one of the distinctions to the Missouri statute. This statute is not a regulation of liquor traffic and sale at all. It bears no analogy to the exercise of the power of prohibition. It proceeds from an entirely different source of power, namely, the power of taxation. It is not a difference in degree, then, but is a totally dissimilar species of legislation than that involved in the prohibitory laws or any other regulating statutes. An analogy to the exercise of the power of prohibition would be presented by any system of licensing fees and requirements, but no such analogy can be traced in this statute.

But over and beyond this, there is a broad and plain distinction impressed upon the commodity itself by the attitude adopted toward it by the State as to its admissibility as a subject of commerce. The States have a right to determine this question. In the prohibition States, liquor is taken out of the realm of commerce. It ceases to be a merchantable commodity within the meaning of the federal constitution, as generally applied and as related to

other products. This is accomplished, not by the inaction or silence of the States upon the subject, but by affirmative legislation. In the absence of all legislation, it could be dealt in with absolute freedom from all restrictions. So, in States like Missouri, where it is recognized as a legitimate and proper subject of commerce, it is not to be so distinguished from other commodities in this respect. This Court, in Scott vs. Donald, (*supra*), called attention to this distinction and stated that it was important to observe that the South Carolina statute did not purport to prohibit either the importation, the manufacture, the sale or the use of intoxicating liquors. The States cannot blow hot and cold at the same time upon this subject. They may not daily recognize and permit intoxicating liquor to be dealt in and treated as an ordinary commercial product and at the same time deny to it the same protection in regard to inspection measures furnished by the federal constitution to other merchantable commodities.

It is a part of the public history of the Wilson bill that it was passed as the result and to obviate the effect of certain decisions of this Court, namely, Leisy vs. Hardin and Bowman vs. Railroad Co. The States of Iowa and Kansas sought to wholly prohibit, within their borders, the sale of all forms of intoxicating liquors, except for medicinal, mechanical and scientific purposes. An unsuccessful effort had been made to have this Court declare these prohibitory laws invalid. In Mugler vs. Kansas, this Court held the statute of Kansas, so far as its domestic or interstate commerce was concerned, to be within the due exercise of the reserved police power of the State; but the result of that decision was very much modified in its practical operation by the circumstance that liquors might still be sent into the State from other States, and sold in original packages, with impunity. *It was to emancipate the States from the operation of the commerce clause of the federal constitution upon the police power of the State within its legitimate limits that*

the Wilson bill was passed, and for no other purposes whatsoever. The statute did not increase the police powers of the State. Its only effect is, as declared by this Court many times, to give free play to those powers that already existed in the States. Whether the State, therefore, deals with this subject in the form of absolute prohibition or by any regulation less than that, the imported commodity being intoxicating liquors, is impressed with the force of State regulation the moment it enters the State; but such regulation must be within the legitimate scope of the police power. *The rule for determining the limits of the proper exercise of that power is the same now as it was before the Wilson bill was passed.* If, under such test, it transcends the power of the State as a police measure, it is still beyond the right of the State to enforce it. It is the *rightful* exercise of the police power that the Wilson bill permits to the States, and not a *wrongful* exercise.

It must, therefore, we think, be accepted as conclusively settled by the federal decisions, that to support the statute in question it must be founded upon the rightful exercise of the police power of the State, a power always reserved to the States and never surrendered to the federal government. The States do not possess an unbridled liberty of action yet. They may not, while recognizing these commodities as legitimate subjects of commerce, so intrude themselves into the doing of the business as to make it impossible. They may not, under the guise of a police regulation, impose burdens upon commerce which have no just relation to the reserved police power. The commodity, being thus recognized and permitted in the State, is entitled to the federal protection accorded to other articles of interstate commerce, save and alone that it becomes subject to the State authority of regulation at an earlier period of time than any other article of commerce. However broad and plenary may be the power of the State in the way of controlling the traffic, when it comes to inspection of interstate shipments, it does

not possess a power like that attempted to be exerted here.

Tried by these principles, then, determinative of the rightful exercise of power, this statute must fall. It is not the proper exercise of the police power of the State. It is not an act regulating the manufacture and sale of intoxicating liquors. It is not an inspection measure, because it does not inspect. It wholly fails in the accomplishment of any public good in the way of securing pure and unadulterated beer. Its failure is not due to any oversight upon the part of the legislature, but to a manifest and sedulous purpose to accomplish, under the pretense of an inspection law, an end and object confessedly beyond the power of the State to obtain.

Most strongly construed in favor of the State, the act amounts merely to a tribute levied upon the non-resident dealer for the privilege of being exempt from a practical inspection of the product which he is sending into the State for sale. The charge placed upon the non-resident dealer in that behalf is grossly disproportionate to the expense of the State incurred, or to the utmost cost that could be incurred in administering the feeble and inefficient powers granted by the act. These charges are so large and so unreasonable that, in the language of this Court in the Taylor and in the New Hope cases, they demonstrate an abuse of discretion on the part of the legislature and require the Court to declare it a tax and not an inspection fee.

We submit that the judgment of the Court below was wrong and should be reversed with directions to enter a decree in favor of the complainant as prayed in its bill.

Respectfully submitted,

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Kansas City, Mo., October 1, 1904.

APPENDIX.

"An act creating the office of inspector of beer and malt liquors of the State, and providing for the inspection of beer and malt liquors manufactured and sold in this State.

"*Be it enacted by the General Assembly of the State of Missouri, as follows:*

"SECTION 1. There is hereby created the office of beer inspector which shall be filled by appointment by the governor by and with the consent of the senate within thirty days after the taking effect of this act, an inspector of beer and malt products, who shall serve for the term of four years and until his successor is duly appointed and qualified. He shall be an expert beer brewer and a citizen of the United States and of this State for more than two years next prior to his appointment. He shall give a bond in the sum of twenty-five thousand dollars, to be approved by the governor, for the faithful performance of the duties of his office.

"SECTION 2. Said inspector shall, with the approval of the governor, appoint such deputies as may be required to carry out the provisions of this act, not to exceed four in number, and such clerical help as may be necessary. Said deputies shall each receive for their services the sum of fifteen hundred dollars per annum, all salaries and expenses to be paid out of the sums of money now, or that may hereafter, be appropriated for said purpose.

"SECTION 3. Every person, persons or corporation who shall erect or keep a brewery for the manufacture or brewing of beer or other malt products within this State,

for the purpose of offering the same for sale shall cause the same to be inspected by said State inspector.

"SECTION 4. No person, persons or corporation, engaged in the brewing or manufacture of beer or other malt liquors, shall use any substance, material or chemical in the manufacture or brewing of beer or other malt liquors, other than pure hops or pure extract of hops, or pure barley, malt or wholesome yeast, or rice.

"SECTION 5. Every person, persons or corporation, who shall receive for sale or offer for sale any beer or other malt liquors other than those manufactured in this State, shall, upon receipt of same, and before offering for sale, notify the inspector, who shall be furnished with a sworn affidavit, subscribed by an officer authorized to administer oaths, from the manufacturer thereof, or other reputable person having actual knowledge of the composition of said beer or other malt liquors, that no material other than pure hops, or extract of hops, or pure barley, malt or wholesome yeast, or rice, was used in the manufacture of same; upon receipt of said affidavit, the inspector shall inspect and label the packages containing said beer or malt liquors, for which services he shall receive like fees as those imposed upon the manufacturers of beer and malt liquors in this State.

"SECTION 6. The inspector appointed under this act shall provide himself with an office, and shall record on the books kept for that purpose the names and places of business of all persons engaged in the manufacture, brewing and sale of beer and malt liquors. He shall keep a record of all malt liquors and beer manufactured, brewed or sold, and the amount produced by each brewer or manufacturer, or sold by dealer. He shall keep a record of all fees collected and all the expenditures incurred, and shall make a complete and full report of the same to the governor upon the first day of each year.

"SECTION 7. It shall be the duty of such inspector to cause to be inspected all beer and other malt liquors brewed or manufactured or sold in this State, and if he shall find that such beer or other malt liquor has been made from pure hops or the pure extract of hops, or of pure barley, malt or wholesome yeast, or rice, to place upon the package containing the said beer or malt liquor his label, certifying that the same has been inspected and made from wholesome ingredients.

"SECTION 7a. It shall be the duty of the State treasurer upon the taking effect of this act to provide suitable and inimitable State certificates and labels for this inspection, gauging and labeling, having on each proper places for countersigning by the State treasurer and inspector, and shall safely keep the same together with the plates used in making them, when not in actual use. The State treasurer shall from time to time, upon demand, deliver the aforesaid labels to the inspector, taking his receipt therefor, and shall charge said inspector with the same; and shall from time to time as said inspector makes returns of moneys collected in the course of his inspection credit said inspector's account with such sums, and shall keep a true and correct book account of his dealings with said inspector.

"SECTION 7b. It shall be unlawful for any person to attempt to make or make, to attempt to sell or sell, or attempt to use or use any of the certificates or labels or both provided for by this act, or imitations thereof, except such persons as by law are allowed to make, sell and use the same, and any person so offending shall be deemed guilty of a felony, and, upon conviction, be punished by imprisonment in the penitentiary for a term not to exceed five years.

"SECTION 8. The inspector shall be entitled to receive for inspection and gauging one cent for each gallon contained in each package, and two cents for labeling each

package. All fees received by the inspector shall be paid into the State treasury. The word package, as used in this act, shall be construed to mean any vessel of any kind other than pint and quart bottles in which any beer or malt liquor may be placed for sale, containing eight gallons or less; when said beer or malt liquors are placed in pint or quart bottles, a package, as used in this act, shall be construed to mean not to exceed forty-eight pint bottles or twenty-four quart bottles of beer or malt liquors, which, when manufactured and so bottled, must, before sale, be placed in suitable cases containing said number and size of bottles, for inspection and stamping by said State inspector; and when said beer or malt liquors shall be placed in vessels containing more than eight gallons, the word package shall be construed to mean each eight gallons or fractional part thereof so contained in said vessel.

"SECTION 9. The expense of said office, including the salaries of the inspector and his deputies, shall be paid monthly out of the amount appropriated by law from the general revenue fund on warrants drawn by the State auditor on vouchers approved by the inspector, and all fees received by the inspector under this act shall, on or before the last day of each month, be paid into the State treasury by said inspector, and shall be placed to the credit of the general revenue fund.

"SECTION 10. Any person who shall sell any beer or malt liquor within this State which has not been inspected according to the provisions of this act, or contained in packages which shall not have upon them the certificate of the State inspector, or any person shall fail to destroy said certificate or label after the contents of said package are disposed of, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine not exceeding five hundred dollars, or by imprisonment in the county jail for a period of not less than six months, and in

addition thereto shall have his license or other authority, giving him the right to manufacture or sell said liquors in this State revoked, and shall not again receive any such license or other authority for a period of two years thereafter.

"SECTION 11. If any inspector shall fail to perform any of the duties imposed upon him by this act, or shall in any manner violate any of the provisions thereof, he shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment in the county jail for not less than thirty days and by a fine not exceeding one thousand dollars, and if any said inspector shall fail to faithfully perform the duties enjoined upon him by this act he may be removed from office by the governor.

"SECTION 12. All prosecutions for fines and penalties under the provisions of this act shall be either by indictment or information in any Court of competent jurisdiction, and when collected shall be paid one-fourth to the informer and three-fourths into the fund for the construction of public roads and highways in the county in which said offense may have been committed and the prosecution begun.

"SECTION 13. All beer and other malt liquors manufactured in this State and exported outside of the State for sale, shall be inspected as other liquors designated in this act, but said inspection shall be free of cost to the manufacturer.

"SECTION 13a. Every railroad, express or transportation company, shall, when requested, furnish to the inspector a duplicate bill of lading or receipt showing the name of the consignor and consignee, date, place received, destination and quantity of beer or malt liquors received by them for shipment to any point within this State. Upon failure to comply with the provisions herein, said railroad, express or transportation company shall forfeit and pay to the State

of Missouri the sum of fifty dollars for each and every failure, to be recovered in any Court of competent jurisdiction. The inspector herein provided for is hereby authorized and empowered to sue in his own name at the relation and to the use of the State. The penalties collected shall be paid into the State treasury.

"SECTION 14. There is hereby appropriated out of the State treasury, chargeable to the general revenue fund, for the years 1899 and 1900, for the pay of the inspector, six thousand dollars; for the pay of the four deputies, twelve thousand dollars; for the rent, stationery, fuel, printing, and such other things as may be necessary for the transaction of the business of said inspector, the sum of six thousand dollars.

Approved May 4, 1899."

ADDENDUM.

We are frank to confess to the Court that the assignments of error appearing at page 76 of the printed record are probably not sufficiently broad and explicit to come within the rules of this Court. It is to be observed, however, that the case turns upon a few clear-cut propositions of law and that nothing is discussed in our brief which did not receive the serious consideration of the court below, as evidenced by its opinion. The defect in the assignments, therefore, is entirely technical, and a more complete and comprehensive statement of the errors complained of, could, in view of the consideration already given to the case by the Court, have had no probable effect.

We speak with the consent and approbation of the counsel for the State of Missouri when we say that it is the earnest desire of all parties that this cause shall be considered and decided upon its merits. The judgment was rendered on April 1, 1903, so that the time within which a second appeal might be prosecuted, in the event of the dismissal of this one, has not expired, and will not have expired at the time this case will be presented for consideration by this Court. Inasmuch therefore, as a dismissal of this appeal, by reason of any insufficiency of the assignments of error, could have no other effect than to impose an additional cost of a second appeal and postpone the ascertainment of the rights of the parties under this statute, we earnestly hope that this Court may see proper to exercise its discretion and review the case upon its merits.

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